IN THE

Supreme Court of the United States

No. 75- 759

JAMES MICHAEL TAYLOR and GLORIA JEANE TAYLOR, husband and wife, on behalf of themselves, individually, and on behalf of others who may be members of a class of persons similarly situated, *Petitioners,*

v.

ST. VINCENT'S HOSPITAL, a Montana Corporation, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ST. VINCENT'S HOSPITAL, a Montana Corporation, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, James and Gloria Taylor, respectfully urge this Court to issue a writ of certiorari to review the final judgment of the United States Court of Appeals for the Ninth Circuit in the above-captioned case.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, dated August 26, 1975, is set out in the Appendix, *infra,* at 1a. It is not yet officially reported.

The opinion of the United States District Court for the District of Montana, dated October 26, 1973, also

set out in the Appendix, *infra,* is officially reported as *Taylor* v. *St. Vincent's Hospital,* 369 F. Supp. 948 (D. Mont. 1973).

JURISDICTION

The final judgment and opinion of the United States Court of Appeals were filed August 26, 1975 (App. at 1a).

No request for rehearing was made.

The certiorari jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULES AT ISSUE

I. The "Church Amendment" [1] to the Medical Facilities Construction and Modernization Amendments of 1970

In pertinent part the "corporate conscience clause" of the "Church Amendment" to the Medical Facilities Construction and Modernization Amendments of 1970 provides:

> "* * *
>
> Sec. 401 (b) The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act by any individual or entity does not authorize any court or any public official or other public authority to require . . .
>
> (2) such entity to—
>
> (A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions . . ."

[1] The clause is widely known as the "Church Amendment" because it was proposed by Senator Frank Church of Idaho.

The statute is Public Law 93-45, 93rd Cong., S. 1136, approved June 18, 1973, 87 Stat. 91.

The questioned provision, in effect, expressly permits a federally funded *hospital,* by vote of a majority of the *governing board,* to order physicians not to perform, and prohibit patients from obtaining sterilization and/or abortion procedures. This restriction is allowed by the statute without regard to the needs and wishes of the particular community, physicians, and patients.

II. St. Vincent's Hospital's Ban on Access to Voluntary Sterilization

Section 6 of the "By-Laws, Rules and Regulations of the Medical and Dental Staff of Saint Vincent's Hospital (June 1972)," provides in pertinent part:

> "The Code of Ethics as adopted by:
>
> * * *
>
> "The Catholic Hospital Association (Ethical and Religious Directives for Catholic Health Facilities)
>
> "shall govern the professional conduct of the members of the medical and dental staff."

Under part II, "Procedures Involving Reproductive Organs and Functions," the "Ethical and Religious Directives for Catholic Health Facilities" provide:

> "Directive
>
> "18. Sterilization, whether permanent or temporary, for men or for women, may not be used as a means of contraception. * * *

"20. Procedures that induce sterility, whether permanent or temporary, are permitted when: a. They are immediately directed to the cure, diminution, or prevention of a serious pathological condition and are not directly contraceptive (that is, contraception is not the purpose) . . . ."

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Corporate Conscience Clause of the "Church Amendment" Violates the Right of Privacy, Infringes the Separation of Judicial From Legislative Authority to Define "State Action," or Contravenes the Establishment Clause of the First Amendment?

II.

Whether the Operation of St. Vincent's Hospital Is Under Color of State Law In That the Institution Serves a Broad Community and Public Function, Has Received Substantial Federal and State Funding Under the Hill-Burton Act, Is Closely Regulated and Licensed by the State, Receives Large Financial Benefits From Tax Exemption, and Is Part of a Joint Federal-State Health Care System for the Nation?

III.

Whether St. Vincent's Policy Forbidding Voluntary Sterilization As a Medical Procedure In the Hospital Abridges the Fundamental Personal Rights of Liberty and Privacy for Mr. and Mrs. Taylor protected by the Fourteenth Amendment?

STATEMENT OF THE CASE

I. Facts: [2] Petitioners, James and Gloria Taylor, are a married couple with two children. They reside with their family in Billings, Montana.

Mr. & Mrs. Taylor expected their second child to be delivered on October 31, 1972, in Billings, at St. Vincent's Hospital, by Caesarean section.[3] This operation was to be Mrs. Taylor's third major surgery.[4]

At that time Mr. & Mrs. Taylor decided that they preferred to have no further children. The decision to stop at two children was based upon four factors, more or less: (1) avoidance of further Caesarean sections, which would be necessary for delivery, and the attendant risks of surgery and anesthesia, (2) their financial and economic situation, (3) studied preference for a two child family, and (4) avoidance of expense from further surgery.

The Taylors preferred St. Vincent's Hospital as the site for the second delivery because of the superior fetal monitoring facilities there, the fact that it is the only hospital in Billings with a maternity service, and the further fact of an intensive care nursery facility.

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[2] Many of the factual contentions were agreed upon and embodied in a Final Pre-Trial Order, which is part of the Record.

[3] Caesarean section ranks eighteenth (18th) among the fifty (50) most frequently performed hospital operations in the United States, and carries a statistical mortality risk of about 111 per 100,000 operations, about one-third that of appendectomy. *See* Kincaid, Deaths in Hospitals Following Surgery, 9 Professional Activities Survey Reporter, No. 12, at 1-3 (Oct. 25, 1971).

[4] The October 31, 1972, operation was her second Caesarean. The third operation was to remove an ovary.

To effectuate their decision to have no more children after the second, Mr. & Mrs. Taylor requested permission for her to have a tubal ligation (sterilization operation) performed at the same time as the Caesarean section. This is a common medical procedure which saves the patient from multiple surgery and the attendant risks.[5]

St. Vincent's Hospital, however, refused to permit Mrs. Taylor to have a tubal ligation, basing its refusal on a By-Law which incorporates by reference the ban on contraceptive sterilization from the "Ethical and Religious Directive for Catholic Health Facilities."

St. Vincent's is a non-profit Montana corporation. A majority of directors are members of the Congregation of Sisters of Charity of Leavenworth, a religious order organized pursuant to authorization of the Roman Catholic Church. Some of the Congregation members are employed as administrators and/or nurses at St. Vincent's. Sisters of Charity of Leavenworth, another corporation, holds title to the hospital's facilities in Billings, Montana.

There are only two hospitals in Billings: St. Vincent's and Billings Deaconess Hospital. The maternity departments of the two, moreover, were consolidated into one in June 1972, at St. Vincent's.

In addition to general comprehensive tax exemption, licensing, and regulation by the State, St. Vincent's Hospital has received at least $390,490 in remodeling

[5] An abdominally performed tubal ligation, like the Caesarean section, requires incision and anesthesia.

A standard text, R. TeLinde & R. Mattingly, Operative Gynecology 377 (4th ed. 1970), states: "Sterilization accompanying caesarean section is a common and convenient time to do the procedure when the section is needed."

and construction grants under the joint federal-State Hill-Burton Act program.[6] Billings Deaconess Hospital received $450,000.[7] Throughout the State of Montana as a whole, fifty-four (54) different hospitals in forty-five (45) cities and towns have received $16,623,000 in Hill-Burton grants.[8] About 45% of these funds were granted to denominational hospitals.[9]

On a national scale, a total of 1398 public and 2267 non-profit community general hospitals have been the recipients of about $3.7 billion in Hill-Burton grants since inception of the program.[10] It is estimated that 35% of the general hospital beds in the United States were financed by the Hill-Burton program.

As shall appear more fully hereinafter, Hill-Burton was set up for the purpose of assisting "public or other nonprofit community hospitals . . . to furnish adequate hospital, clinic, or similar services to all their people. . . ." 42 U.S.C. § 291(a). *All*, as interpreted by St. Vincent's Hospital, excludes patients who need voluntary sterilization procedures.

II. When and How the Federal Questions Were Raised and Decided Below

Mr. & Mrs. Taylor filed a Verified Complaint in the United States District Court for the District of Montana, Billings Division, on October 25, 1972, commenc-

[6] Hill-Burton Project Register, July 1, 1947-June 30, 1971, pp. 178-181 (June 30, 1971).

[7] *Id.*

[8] *Id.*

[9] *Id.*; Guide Issue, Journal Am. Hosp. Ass'n (Aug., 1972).

[10] Facts About the Hill-Burton Program, July 1, 1947-June 30, 1971, p. 4 (H.E.W. 1972).

ing this civil action and requesting immediate injunctive relief to enable Mrs. Taylor to have a tubal ligation at the same time as the Caesarian section scheduled for October 31, 1972, six days away.

Jurisdiction was predicated upon 28 U.S.C. § 1343 (3), in conjunction with 42 U.S.C. § 1983, and a class action alleged. Mr. & Mrs. Taylor asserted rights under the First, Ninth, Fourteenth, and other amendments to the Constitution. They further claimed that the policy of St. Vincent's Hospital forbidding voluntary sterilization generally, and in Mrs. Taylor's case particularly, violated the Establishment Clause of the First Amendment. In addition to injunctive relief, Mr. & Mrs. Taylor made a claim for actual and special damages.

After a hearing, the District Court issued its first Memorandum Opinion and Order on October 27, 1972. *Taylor* v. *St. Vincents Hosp.*, Civ. No. 1090 (D. Mont.).

The Court found jurisdiction under 28 U.S.C. § 1343, and that St. Vincent's Hospital was "acting under color of law" because of "the advantageous position accorded it by [Montana's] tax structure and the benefit it has received by virtue of Hill-Burton funds." Accordingly, the Court issued an injunction allowing Mrs. Taylor to have a tubal ligation with the Caesarean section.

On November 1, 1972, the District Court issued a second Memorandum Opinion and Order and an Amended Memorandum Opinion and Order. The latter contracted the previously issued injunction against the hospital to cover only sterilizations requested "contemporaneously with a Caesarean section. . . ." The

former further elaborated the basis of the Court's overall decision.

First, the Court stressed the fact that St. Vincent's was the "exclusive maternity facility in the area." The Court then stated:

> "[T]he exclusive public service function of this hospital is sufficiently affected by the general control of state law and regulation and connected sufficiently with federal funds administered by the state to justify a finding that the defendant is acting under color of law for purposes of application of 42 U.S.C. § 1983."

Further reliance was placed upon the facts of "tax dispensation under Montana law," and "strict licensing, regulation and control of hospitals" under Montana law.

The case then proceeded through discovery and pretrial.

Enactment of the "Church Amendment" to the Medical Facilities Construction and Modernization Amendments of 1970, Public Law 93-45, 93rd Cong., S. 1136, 87 Stat. 91 (June 18, 1973), dramatically altered the approach of the District Court. The final Opinion and Order, issued October 26, 1973, reversed itself and denied all relief. 369 F. Supp. 948 (D. Mont. 1973), solely because of the Church Amendment.

The District Court first characterized petitioner's claims of jurisdiction under 42 U.S.C. § 1983 over the hospital as "grounded primarily on the fact that Hill-Burton grants have been used to defray a portion of the cost of hospital remodeling and construction over the years." 369 F. Supp. at 950. Reliance on the receipt of Hill-Burton funds to support a finding of

"state action," however, was now barred by the Church Amendment. According to the District Court, "this Act prohibits any court from finding that a hospital which receives Hill-Burton funds is acting under color of state law." 369 F. Supp. at 950. The Court cited segments from the legislative history indicating that one objective of the Act may well have been specifically directed toward overruling its prior decisions in the case. 369 F. Supp. at 950 n.1, citing 1973 U.S. Code Cong. & Admin. News, p. 1553.

No consideration was given to finding "state action" based upon other factors which had weighed so heavily in the District Court's prior decisions. The factors of "exclusive public service function," "tax dispensation under Montana law," and "strict licensing, regulation and control of hospitals" were all ignored.

Petitioners had filed a memorandum with the District Court contesting the Church Amendment as unconstitutional. Without analysis, discussion, or even citation of authority, the District Court stated in one sentence: "[T]he case law relied upon by plaintiffs relates to parochial schools and is distinguishable from the instant case." 369 F. Supp. at 951.

Further, the District Court found, the Church Amendment was a valid Congressional limitation on the jurisdiction of the lower federal courts, and appropriate legislation regarding the remedies which such courts might grant. Two cases, neither of which appears fully to control, were cited, *Lockerty* v. *Phillips*, 319 U.S. 182, 187 (1943), and *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240 (1937).

Petitioners then appealed to the United States Court of Appeals for the Ninth Circuit, further pressing

their federal constitutional claims which are again raised in this Court.

The Ninth Circuit, on August 26, 1975, affirmed, noting that "virtually all of the issues raised by this appeal have recently been resolved adversely to appellants by another panel of this court. *Chrisman* v. *Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974)" (App. at 4a). The Court reiterated the *Chrisman* holdings as follows:

> "I. The Church Amendment (§ 401(b)) properly permits denominational hospitals to refuse to perform sterilizations. 506 F.2d at 310-312.
>
> II. Section 401(b) is not an impermissible legislative limitation upon judicial power, *id.* at 311, nor does it violate the Establishment Clause of the First Amendment. *Id.*
>
> III. If the hospital's refusal to perform sterilization infringes upon any constitutionally cognizable right to privacy, such infringement is outweighed by the need to protect the freedom of religion of denominational hospitals "with religious or moral scruples against sterilizations and abortions." *Id.* at 312. (Citations omitted).
>
> IV. Neither "the enjoyment by the hospital of tax exemptions, its regulation by the state and its performance of a public function" in addition to receipt of Hill-Burton funds, are proper grounds for holding that it acted under color of state law with respect to 42 U.S.C. § 1983. *Chrisman*, 506 F.2d at 312-314." (Appendix at 4a-5a).

Relying upon *Jackson* v. *Metropolitan Edison*, 419 U.S. 345 (1974), the Ninth Circuit further held that the monopoly status of St. Vincent's Hospital did not alter the result.

Neither the panel below nor that in *Chrisman* analyzed the highly pertinent legislative history of the Hill-Burton Act. The long line of similar cases from the Fourth Circuit which reached a different result were also ignored. *E.g., Duffield* v. *Charleston Area Medical Center, Inc.*, 503 F.2d 512 (4th Cir. 1974); *Christhilf* v. *Annapolis Hosp. Ass'n.*, 496 F.2d 174 (4th Cir. 1974); *Sams* v. *Ohio Valley Gen. Hosp. Ass'n.*, 413 F.2d 826 (4th Cir. 1969); *Simkins* v. *Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963) (en banc), *cert. denied*, 376 U.S. 938 (1964).

Similarly, supporting decisions from the First, Third, Fifth, Sixth, and Seventh Circuits were not addressed. *E.g., Bricker* v. *Sceva Speare Mem. Hosp.*, 468 F.2d 1228 (1st Cir. 1972), *aff'g* 339 F. Supp. 234 (D.N.H.); *Citta* v. *Delaware Valley Hosp.*, 313 F. Supp. 301 (E.D.Pa. 1974); *Pollock* v. *Methodist Hosp.*, 392 F. Supp. 393 (E.D.La. 1975); *Chiaffitelli* v. *Dettmer Hosp.*, 437 F.2d 429 (6th Cir. 1971); *Holmes* v. *Silver Cross Hosp.*, 340 F. Supp. 125 (N.D. Ill. 1972).

This is not to say that Respondent cannot support its position with citation of authority. The split among Circuits is a very serious one.

REASONS FOR GRANTING THE WRIT

I.

The Court Should Review This Case To Resolve Important Federal Questions and Multiple Circuit Conflicts Concerning the Constitutionality of the Church Amendment "Corporate Conscience Clause" Which Permits Hospital Boards in the National Network of Hill-Burton Community Hospitals To Order Physicians Not To Perform and Prohibit Patients From Obtaining Voluntary Sterilization and/or Abortion Procedures, Regardless of the Needs of the Community, Physicians and Patients.

This case is important and deserves review because it has wide impact on tens of thousands of people. The federal questions, too, are recurring frequently in the lower courts which are sharply divided. Moreover, the decision below is inadequately reasoned and plainly erroneous.

The "corporate conscience clause" of the Church Amendment, held by the Court of Appeals to bar jurisdiction over Petitioners' assertion of their constitutional rights of liberty and privacy, is invalid on any one of three grounds.

A. First, the clause operates to abridge the constitutionally protected right of privacy in matters pertaining to the decision whether to bear or beget further children, a right firmly recognized by the following cases: *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Roe* v. *Wade*, 410 U.S. 113 (1973). It effects this deprivation by denying Petitioners and others similarly situated a cause of action against community non-profit hospitals (funded by the comprehensive state-federal Hill-Burton program) which discriminate against physicians and patients requesting use of

hospital facilities for voluntary sterilization procedures.

Accordingly, the Church Amendment "may be justified only by a 'compelling state interest' [and] must be narrowly drawn to express only the legitimate state interests at stake," *Roe* v. *Wade,* 410 U.S. 113, 155 (1973). Only one legitimate state interest is remotely related to the "corporate conscience clause," that of protecting personal and individual freedom of conscience. The concept of "corporate conscience" is without a basis or foundation in law. Since the "corporate conscience clause" of the Church Amendment goes far beyond the scope necessary for protection of individual conscience, it unjustifiably abridges the right of privacy, is not "narrowly drawn," and is unconstitutional.

B. Second, the Church Amendment violates the Fourteenth Amendment separation of legislative from judicial function to define the constitutional concept of "state action." The Amendment forbids a court to value funding by the state-federal hospital planning and construction programs of the Hill-Burton Act, 42 U.S.C. § 291, as a factor pointing toward "state action." Article III of the constitution, however, vests the "judicial power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Since *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803), the Courts, not Congress, have construed the Constitution. Congress may not forbid a Court to give "the effect to evidence which, in its own judgment, such evidence should have . . . ." *United States* v. *Klein,* 80 U.S. (13 Wall.) 128, 147 (1871). A law so decreeing "passe[s] the limit which

separates the legislative from the judicial power." 80 U.S. (13 Wall.) at 147.

If the Church Amendment is valid, then Congress itself may dismantle the Fourteenth Amendment piece-by-piece and overrule any constitutional decision on "state action" a majority finds objectionable on a particular day. Congress may no more contract the Fourteenth Amendment than it may limit freedom of the press to a selected list of approved newspapers.

C. Third, the Church Amendment, on its face, violates the First Amendment command that "Congress shall make no law respecting an establishment of religion . . . ." The "corporate conscience clause" sanctions discrimination by government supported community hospitals against a class of physicians and patients "on the basis of religious beliefs or moral convictions . . . " held by the hospital administration, not the patient seeking medical care. On the one hand, the joint State-Federal Hill-Burton program requires a "State plan [which] shall provide for adequate hospitals . . . for all persons residing in the State . . . ," 42 U.S.C. § 291c(e), while the Church Amendment allows hospitals to impose "religious beliefs or moral convictions . . . " on physicians and patients who do not share those beliefs, but who are persons needing the hospital.

Case law on federal aid to parochial schools is controlling in this similar context of a joint state-federal program aiding "public or other non-profit community hospitals . . . ," 42 U.S.C. § 291(a), including those operated by religious orders. Just as *Norwood* v. *Harrison,* 413 U.S. 455, 462 (1973), held that the "Religion Clauses of the First Amendment strictly confine

state aid to sectarian education . . . ," so here those clauses limit government support of sectarian medicine.

Hill-Burton grants for construction and facility improvement in non-profit community hospitals operated by a religious order are not constitutionally distinguishable from the administrative operating grants made to parochial schools in New York, and ruled impermissible in *Levitt* v. *Committee for Public Education,* 413 U.S. 472 (1973), nor from maintenance and repair grants, tuition grants and tax credits for sectarian schools found unconstitutional in *Committee for Public Education* v. *Nyquist,* 413 U.S. 756 (1973). Hill-Burton construction grants to denominational hospitals did not differentiate between the medical and religious uses of the facilities. Hospital discrimination in the use of such facilities as regards voluntary sterilization, contraception, and abortion, therefore, result from "excessive entanglement by the State in the affairs of the religious institution." *Levitt, supra,* 413 U.S. at 481.

The "Church Amendment," far from a statement of government neutrality, involves the State and Federal authorities even more deeply in the religious mission of the Hill-Burton funded sectarian hospital. It attempts to exempt sectarian hospitals from public responsibility and to authorize the operation of a hospital according to religious directives. This constitutes the "excessive entanglement" forbidden by the First Amendment Establishment Clause.

II.

The Court Should Resolve the Conflict of Circuits as to Application of the "State Action" Doctrine to the National Network of Non-profit Community Hospitals Established Under the Hill-Burton Act.

Petitioners have previously cited decisions from six different Circuits which addressed in various settings the problem of federal court jurisdiction [11] over actions against non-profit community hospitals constructed with Hill-Burton funds.[12] The Second,[13] Eighth,[14] and Tenth [15] Circuits, too, have dealt with these issues, coming to different results, each with a unique rationale.

The Fourth Circuit has consistently found state action based upon a sophisticated analysis of participation in the Hill-Burton program alone, or even less. See *Doe* v. *Charleston Area Medical Center, Inc.,* — F.2d — (4th Cir. Nov. 6, 1975) (No. 75-1161), and *Eaton* v. *Grubbs,* 329 F.2d 710 (4th Cir. 1964) (en banc).

By contrast, the Ninth Circuit has most insistently and frequently gone the other way. See, in addition to the instant case, *Christman, supra,* and *Ascherman* v. *Presbyterian Hosp.,* 507 F.2d 1103 (9th Cir. 1974).

The Sixth Circuit has vacillated. Compare *O'Neill* v. *Grayson Cnty. War Mem. Hosp.,* 472 F.2d 1140 (6th Cir. 1973) (state action found), and *Chiaffitelli,*

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[11] Under 28 U.S.C. § 1343 and 42 U.S.C. § 1983.

[12] Hill-Burton has provided grants under 42 U.S.C. § 291 et seq. for initial construction, additions and special units.

[13] *Barrett* v. *United Hosp.,* 506 F.2d 1395 (2nd Cir. 1974).

[14] *Stanturf* v. *Sipes,* 335 F.2d 224 (8th Cir. 1964).

[15] *Ward* v. *St. Anthony Hosp.,* 476 F.2d 671 (10th Cir. 1973).

supra, with *Jackson* v. *Norton Children's Hosp.,* 487 F.2d 502 (6th Cir. 1973) (no state action).

Definitive guidance from this Court is needed, not only for the increasing number of lower courts confronted with these issues, but also because some 1,398 public and 2,267 non-profit community hospitals have participated in the nationwide Hill-Burton program, receiving over $3.7 billion in grants.[16]

It is important that the citizens who paid the $3.7 billion in federal tax monies expended by Hill-Burton should not be excluded from access to voluntary sterilization and aborton on the basis of religious beliefs held by a handful of hospital administrators who have never been in an operating room.

More importantly, to hold otherwise would allow federally supported non-profit community hospitals to subvert the holdings of this Court in *Roe* v. *Wade,* 410 U.S. 113 (1973), and related cases. Over 35% of the hospital beds in the United States were financed by Hill-Burton moneys.[17] The Act was set up for the purpose of assisting "public or other nonprofit community hospitals . . . to furnish adequate hospital, clinic or similar services to *all* their people . . ." 42 U.S.C. §291 (a). Yet, without direction from this Court, *all* has been taken to exclude from hospitals those patients seeking abortion and sterilization.

The federal and state governments are deeply involved in determining the nature, extent, financing, and quality of health care services in the United States.

[16] Facts about the Hill-Burton program, July 1, 1947-June 30, 1971, p. 4 (H.E.W. 1972).

[17] *Id.*

The degree of involvement exceeds that with public utilities, *Jackson, supra,* and more nearly approaches the extent found in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961), and *Reitman* v. *Mulkey,* 387 U.S. 369 (1967).

The issues in this Petition are recurring and will not go away. They are important to large numbers of people and institutions throughout the United States. There could be no more appropriate case in which to resolve the constitutionality of the Church Amendment and corollary state action questions than the very case which prompted Senator Church to introduce the legislation at issue here.

CONCLUSION

For the reasons set out, this Court should grant the Petition and set this case for plenary review.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Ninth Circuit, filed August 26, 1975

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-1142

JAMES MICHAEL TAYLOR and GLORIA JEANE TAYLOR, husband and wife, on behalf of themselves, individually, and on behalf of others who may be members of a class of persons similarly situated,

Plaintiffs-Appellants,

vs.

ST. VINCENT'S HOSPITAL, a Montana Corporation,

Defendant-Appellee.

OPINION

[August 26, 1975]

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

Before: KOELSCH and CARTER, *Circuit Judges*, and SCHNACKE*, *District Judge.*

JAMES M. CARTER, *Circuit Judge.*

The Taylors appeal from the judgment of the district court, sitting without a jury, based upon the stipulated facts which appear in the court's final pre-trial order. We affirm.

In its Opinion, 369 F.Supp. 948 (D. Montana 1973), the court aptly summarized the pertinent facts as follows:

> "St. Vincent's Hospital is a private corporation which operates a hospital facility in Billings, Montana, known as St. Vincent's Hospital. It has done so since May 1, 1972, when it took over the operation of a

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* Honorable Robert H. Schnacke, United States District Judge, Northern District of California, sitting by designation.

hospital from the Sisters of Charity of Leavenworth, also a private corporation, whose members are all members of a religious order of that name. The physical facilities of St. Vincent's Hospital are now and at all times material in this case have been owned by the Sisters of Charity of Leavenworth, a corporation.

"As a private, charitable, non-profit corporation, St. Vincent's Hospital received certain tax benefits from the State of Montana. The Sisters of Charity of Leavenworth, a corporation, when it operated St. Vincent's Hospital, also applied for and received funds under the Hill-Burton Act (42 U.S.C. §§ 291-291(c)) during the years 1956 through 1963.

"Tubal ligation as a sterilization procedure had not, prior to the preliminary injunction issued by this court in this cause, been performed at St. Vincent's hospital because of the interpretation placed upon the publication entitled "Ethical and Religious Directives for Catholic Hospitals" which is incorporated by reference in the By-laws of the medical staff of St. Vincent's Hospital. The Bishop of Eastern Montana of the Roman Catholic Church has the responsibility to interpret the directives for members of the Church of Eastern Montana, including members of the congregation of the Sisters of Charity of Leavenworth who are on the Board of Directors or are employed at St. Vincent's Hospital. The Preamble in the "Ethical and Religious Directives" makes it clear that they are based upon moral convictions.

"St. Vincent's Hospital and Billings Deaconess Hospital are the only hospitals in Billings, Montana. In June, 1972, the maternity departments of the two hospitals were combined in St. Vincent's Hospital, and an intensive care nursery was constructed in St. Vincent's Hospital in order to reduce infant mortality in the community and to reduce the cost to the commu-

nity of duplicated maternity services. Prior to approving consolidation of maternity services at St. Vincent's Hospital, the Trustees of Sisters of Charity of Leavenworth advised local obstetricians and trustees of the Billings Deaconess Hospital that surgical sterilizations would not be allowed at St. Vincent's Hospital. The consolidation was completed and the combined maternity department with intensive care facilities opened in June, 1972.

"The plaintiffs, James and Gloria Taylor, are a married couple who were expecting a second child to be delivered by Caesarian [sic] section on October 31, 1972. The couple decided that they wished Mrs. Taylor to be sterilized by tubal ligation at the time of the Caesarian [sic] section and requested permission of St. Vincent's Hospital for the procedure. Permission was denied." *Id.* at 949.

Initially, the district court issued an injunction allowing Mrs. Taylor to have a tubal ligation with the cesarean section, and found that the hospital had acted "under color of state law" (42 U.S.C. § 1983) by virtue of its advantageous state tax position and receipt of Hill-Burton Act funds, *supra.* However, on June 18, 1973, the "Church Amendment (§ 401(b)) of the Health Programs Extension Act of 1973, P.L. 93-45, 87 Stat. 91, was signed into law.[1]

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[1] In pertinent part the "Church Amendment" provides:

". . .

Sec. 401(b). The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Service and Facilities Construction Act by any individual or entity does not authorize any court or any public official or other public authority to require . . . (2) such entity to——

(A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of

Finding that "[b]y its plain language, the Act prohibits any court from finding that a hospital which receives Hill-Burton funds is acting under color of state law," the court dissolved its prior injunction and denied all relief. This appeal ensued.

First, despite the fact that Mrs. Taylor has already had the tubal ligation performed, this case is not moot because of its class action nature. *See Sosna* v. *Iowa,* —— U.S. ——, 43 U.S.L.W. 4125, 4127-4129 (January 14, 1975).

Second, virtually all of the issues raised by this appeal have recently been resolved adversely to appellants by another panel of this court. *Chrisman* v. *Sisters of St. Joseph of Peace,* 506 F.2d 308 (9 Cir. 1974). With respect to those issues relevant to the present case, *Chrisman* held that:

I. The Church Amendment (§ 401(b)) properly permits denominational hospitals to refuse to perform sterilizations. 506 F.2d at 310-312.

II. Section 401(b) is not an impermissible legislative limitation upon judicial power, *id.* at 311, nor does it violate the Establishment Clause of the First Amendment. *Id.*

III. If the hospital's refusal to perform sterilization infringes upon any constitutionally cognizable right to privacy, such infringement is outweighed by the need to protect the freedom of religion of denominational hospitals "with religious or moral scruples against sterilizations and abortions." *Id.* at 312. *See Doe* v. *Bolton,* 410 U.S. 179, 197-198 (1973); *Allen* v. *Sisters of St. Joseph,* 361 F.Supp. 1212 (N.D. Texas 1973), *aff'd,* 490 F.2d 81 (5 Cir. 1974); *Watkins* v. *Mercy Medical Center,* 364 F.Supp. 799 (D. Idaho 1973); *Doe* v. *Bellin Memorial Hospital,* 479 F.2d 756, 759-760 (7 Cir. 1973) (abortions).

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such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions . . ."

IV. Neither "the enjoyment by the hospital of tax exemptions, its regulation by the state and its performance of a public function" in addition to receipt of Hill-Burton funds, are proper grounds for holding that it acted under color of state law with respect to 42 U.S.C. § 1983. *Chrisman,* 506 F.2d at 312-314.

There is one significant difference between the present case and *Chrisman, supra,* namely, the fact that St. Vincent's Hospital had the only maternity department in Billings, Montana, where the plaintiff could secure a tubal ligation at the time of her cesarean delivery. In *Chrisman* the hospital involved was not the only hospital in Eugene, Oregon, to supply such services. As a result, in *Chrisman,* it was not necessary to consider whether the "state action" might be found from the fact that the hospital was the only one in the area able to supply the services above.

However, the Supreme Court in *Jackson* v. *Metropolitan Edison Company,* —— U.S. —— (43 U.S.L.W. 4110, December 23, 1974), decided about a month after this court decided *Chrisman,* held that private conduct may not be regarded as that of the state unless the state is involved in the specific activity complained of, and that the monopoly status of a private utility company did not in itself or in combination with state regulation and the fact that an essential public service was involved, constitute "state action." There the Supreme Court in upholding the district court and the affirmation by the Third Circuit, stated:

> "All of petitioner's arguments taken together show no more than that Metropolitan was a heavily regulated private utility, enjoying at least a partial monopoly in the providing of electrical service within its territory, and that it elected to terminate service to petitioner in a manner which the Pennsylvania

Public Utilities Commission found permissible under state law. Under our decision this is not sufficient to connect the State of Pennsylvania with respondent's action so as to make the latter's conduct attributable to the State for the purposes of the Fourteenth Amendment." (p. ——; 43 U.S. L.W. 4114).

With respect to the argument that "state action" should be found from Metropolitan's monopoly status, the Court said:

> "Petitioner first argues that 'state action' is present because of the monopoly status allegedly conferred upon Metropolitan by the State of Pennsylvania. As a factual matter, it may well be doubted that the State ever granted or guaranteed Metropolitan a monopoly. But assuming that it had, the fact is not determinative in considering whether Metropolitan's termination of service to petitioner was 'state action' for purposes of the Fourteenth Amendment. In *Pollak, supra,* where the Court dealt with the activities of the District of Columbia Transit Company, a congressionally established monopoly, we expressed [expressly] disclaimed reliance on the monopoly status of the transit authority. *Id.*, at 462. Similarly, although certain monopoly aspects were presented in *Moose Lodge No. 107, supra,* we found that the lodge's action was not subject to the provisions of the Fourteenth Amendment. In each of these cases, there was insufficient relationship between the challenged actions of the entities involved and their monopoly status. There is no indication of any greater connection here." (p. ——: 43 U.S.L.W. 4112).

Likewise, in our case, as in *Jackson*, there is "insufficient relationship between the challenged actions of the entity involved and their monopoly status."

In addition, there is even less justification here than in *Jackson* for finding "state action" or color of state law in the operation of St. Vincent's Hospital because of its monopoly status. In *Jackson* the court assumed for the purpose of its decision that Metropolitan's monopoly was state-created and guaranteed. In our case there is not even a suggestion that the State of Montana had anything to do with the fact that St. Vincent's Hospital provided the only complete maternity services in Billings, Montana.

Jackson rejected the contention, also made by plaintiff here, that "state action" was present because the defendant provided "an essential public service" and thus performed a "public function." *Id.* —— (43 U.S.L.W. 4112). The operation of a denominational hospital can no more be held to involve "the exercise by private entity of powers traditionally exclusively reserved to the State," *id.* —— (43 U.S.L.W. 4112) than can the operation of a private electrical utility company.

The question of whether a denominational hospital, which is the only hospital in the community with certain desired facilities, performs a public function for Fourteenth Amendment purposes has been decided by both the Montana Supreme Court and the federal district court in Montana. In *Ham* v. *Holy Rosary Hospital,* 529 P.2d 361 (Montana 1974), on facts identical to those here, except that no Hill-Burton funds had been received, the Supreme Court of Montana adopted an unreported opinion by Chief Judge Russell E. Smith of the United States District Court for the District Montana, holding:

> "There is no significant relationship between the state and the action here sought to be enjoined. . . .
>
> The fact that Holy Rosary Hospital has a practical, but not state enforced, monopoly in obstetrical service in Miles City does not make its action state action."

Finally, there is serious question as to whether any monopoly actually exists in Billings, Montana, as to cesarean delivery. The record shows that an agreement was entered into between St. Vincent's Hospital and Billings Deaconess Hospital prior to the hearing in the district court providing for a procedure whereby after a woman had been admitted to St. Vincent's Hospital she could be transferred by ambulance approximately two and a half city blocks to Deaconess Hospital where the cesarean section and tubal ligation could be performed and the baby delivered. It provided for the maintenance and transportation of intensive care equipment (a Kreiselman and Armstrong incubator and adapter) to Deaconess Hospital the evening before the scheduled surgery, and the transportation back to St. Vincent's Hospital of the intensive care equipment and newborn child, after surgery.

We hold that state action or action under color of state law was not involved.

Judgment AFFIRMED.

Opinion of the United States District Court for the District of Montana, filed October 26, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Civil No. 1090

JAMES MICHAEL TAYLOR and GLORIA JEANE TAYLOR, husband and wife, on behalf of themselves, individually, and on behalf of others who may be members of a class of persons similarly situated,

Plaintiffs,

vs.

ST. VINCENT'S HOSPITAL, a Montana Corporation,

Defendant.

OPINION AND ORDER

(Filed October 26, 1973)

The parties have agreed that the court may render a decision in this cause without a trial, based upon the stipulated facts which appear in the court's final pre-trial order. Those pertinent facts may be summarized as folows:

St. Vincent's Hospital is a private corporation which operates a hospital facility in Billings, Montana, known as St. Vincent's Hospital. It has done so since May 1, 1972, when it took over the operation of the hospital from the Sisters of Charity of Leavenworth, also a private corporation, whose members are all members of a religious order of that name. The physical facilities of St. Vincent's Hospital are now and at all times material in this case have been owned by the Sisters of Charity of Leavenworth, a corporation.

As a private, charitable, non-profit corporation, St. Vincent's Hospital received certain tax benefits from the State

of Montana. The Sisters of Charity of Leavenworth, a corporation, when it operated St. Vincent's Hospital, also applied for and received funds under the Hill-Burton Act (42 U.S.C. §§ 291-291(e)) during the years 1956 through 1963.

Tubal ligation as a sterilization procedure had not, prior to the preliminary injunction issued by this court in this cause, been performed at St. Vincent's Hospital because of the interpretation placed upon the publication entitled "Ethical and Religious Directives for Catholic Hospitals" which is incorporated by reference in the By-laws of the medical staff of St. Vincent's Hospital. The Bishop of Eastern Montana of the Roman Catholic Church has the responsibility to interpret the directives for members of the Church of Eastern Montana, including members of the congregation of the Sisters of Charity of Leavenworth who are on the Board of Directors or are employed at St. Vincent's Hospital. The Preamble in the "Ethical and Religious Directives" makes it clear that they are based upon moral convictions.

St. Vincent's Hospital and Billings Deaconess Hospital are the only hospitals in Billings, Montana. In June, 1972, the maternity departments of the two hospitals were combined in St. Vincent's Hospital, and an intensive care nursery was constructed in St. Vincent's Hospital in order to reduce infant mortality in the community and to reduce the cost to the community of duplicated maternity services. Prior to approving consolidation of maternity services at St. Vincent's Hospital, the Trustees of Sisters of Charity of Leavenworth advised local obstetricians and trustees of the Billings Deaconess Hospital that surgical sterilizations would not be allowed at St. Vincent's Hospital. The consolidation was completed and the combined maternity department with intensive care facilities opened in June, 1972.

The plaintiffs, James and Gloria Taylor, are a married couple who were expecting a second child to be delivered by Caesarian section on October 31, 1972. The couple decided that they wished Mrs. Taylor to be sterilized by tubal ligation at the time of the Caesarian section and requested permission of St. Vincent's Hospital for the procedure. Permission was denied.

Plaintiffs allege in their complaint that the defendant in refusing to permit Mrs. Taylor to undergo a tubal ligation at the time of her Caesarian delivery infringed certain rights guaranteed to the plaintiff by the United States Constitution. The plaintiffs further allege that the infringement was committed under color of state law. The prayer asked for injunctive relief, not only for the Taylors, but also for "other persons similarly situated in the State of Montana."

The plaintiffs seek to invoke the jurisdiction of this court under the provisions of 42 U.S.C. § 1983 and 28 U.S.C. § 1343. 42 U.S.C. § 1983 reads:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. § 1343 reads in pertinent part:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: • • •
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom

or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; * * *."

Essential to the plaintiffs' invocation of jurisdiction in this cause is that the defendant, in its alleged violation of the plaintiffs' constitutional rights, acted under color of state law. The plaintiffs' assertion that the defendant is acting under the color of state law is grounded primarily on the fact that Hill-Burton grants have been used to defray a portion of the cost of hospital remodeling and construction over the years. In fact, this court, in its order dated October 27, 1972, found jurisdiction in this cause because of the receipt of such funds by the defendant.

However, on June 18, 1973, the President signed into law the Health Programs Extension Act of 1973. Title IV, Section 401, of that Act, provides in part:

"(b) The receipt of any grant, contract, loan or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act, by any individual or entity does not authorize any court or any public official or other public authority to require * * *

"(2) such entity to—

"(A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facility is prohibited by the entity on the basis of religious beliefs or moral conviction . . . ."

Public Law 93-45; 87 Stat. 91, Section 401(b).

By its plain language, this Act prohibits any court from finding that a hospital which receives Hill-Burton funds, is acting under color of state law. The above sections were specifically aimed at such a result as evidenced by the legislative history.[1]

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[1] See H.R. No. 93-227; 1973 U.S.C.C. & A.N. 1953. The latter includes the following language:

"The background for subsection (b) of section 401 of the bill is an injunction issued in November 1972 by the United States District Court for the District of Montana in *Taylor* v. *St. Vincents Hospital*. The court enjoined St. Vincents Hospital, located in Billings, Montana, from prohibiting Mrs. Taylor's physician from performing in that hospital a sterilization procedure on her during the delivery of her baby by Caesarian section.

"The suit to enjoin the hospital was brought under 42 U.S.C. 1983 (which authorizes civil actions for redress of deprivation of civil rights by a person acting under color of law) and 28 U.S.C. 1343 (which grants United States district courts jurisdiction of actions (authorized by another law) to redress deprivation, under color of any State law, of a Constitutional right). In ruling on a motion to dismiss for lack of jurisdiction, the court stated that 'the fact that the defendant [St. Vincents Hospital] is the beneficiary of the receipt of Hill-Burton Act [title VI of the Public Health Service Act] funds is alone sufficient to support an assumption of jurisdiction. . . .' The court also found two other factors (state licensing and tax immunity) that established a connection between the hospital and the State sufficient to support jurisdiction.

"Subsection (b) of 401 would prohibit a court or a public official, such as the Secretary of Health, Education, and Welfare, from using receipt of assistance under the three laws amended by the bill (the Public Health Service Act, the Community Mental Health Centers Act, and the Developmental Disabilities Services and Facilities Construction Act) as a basis for requiring an individual or institution to perform or assist in the performance of sterilization procedures or abortions, if such action would be contrary to religious beliefs or moral conviction.

"In recommending the enactment of this provision, the Committee expresses no opinion as to the validity of the *Taylor* decision."

In a recent memorandum filed in this action, the plaintiffs attack the Constitutionality of Section 401(b). Specifically, the plaintiffs launch a direct attack upon this section as being contrary to the establishment clause of the First Amendment. However, the question of the Constitutionality of that section is not before this court. Furthermore, the case law relied upon by plaintiffs relates to parochial schools and is distinguishable from the instant case.

Nor does Section 401(b) present any question of retroactive application. It simply limits the remedies the court may grant. It can only affect pending and future court proceedings and does not purport to affect cases in which judgments have become final. Moreover, there is nothing in Section 401(b) to suggest that it applies only in situations where receipt of the public funds occurred after the effective date of the Act. To apply Section 401(b) in such a way would produce the bizarre result that hospitals which have received Hill-Burton funds prior to June 18, 1973, could be forced to permit sterilizations, while those which received such funds after June 18, 1973, could not. This was not the Congressional intent.

Furthermore, there can be no doubt that Section 401(b) which restricts the course and power of inferior federal courts is a valid exercise of Congressional power. Under Article III of the Constitution, Congress can establish such inferior courts as it chooses. Its power to create those courts includes the power to invest them with such jurisdiction as it deems appropriate for the public. *Lockerty* v. *Phillips*, 319 U.S. 182, 187 (1943). Further, Congress is free to legislate with respect to remedies the inferior Federal courts may grant. *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240 (1937).

For the foregoing reasons, It Is Hereby Ordered that the plaintiffs be denied all relief.

It Is Further Ordered that the preliminary injunctive relief issued by this court on October 27, 1972, is dissolved.

The Clerk of this court is directed to enter judgment accordingly.

Done and dated this 26th day of October, 1973.

/s/ [Illegible]
United States District Judge

Memorandum Opinion and Order
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Civil No. 1090
MEMORANDUM AND ORDER
(CAPTON OMITTED IN PRINTING)
(FILED NOVEMBER 1, 1972)

The defendant has orally moved for dismissal of this cause on the ground that this court lacks jurisdiction. In a previous order this court noted its conclusion that it has jurisdiction. This opinion and order will explain the rationale of that conclusion.

If the allegations of the plaintiff are sufficient to state a claim under 42 USC § 1983, then this court has jurisdiction under 28 USC § 1343, which vests in U.S. District Courts the authority to hear claims of deprivation of civil rights.[1]

§ 1983 allows the commencement of a civil action for redress of the deprivation of civil rights by a person acting "under color of" law. Two questions thus arise concerning the application of the statute: 1) Whether this defendant is a "person" within the meaning of the section; and 2) If so, can it be said to be acting under color of law regarding the conduct which is the subject of the

[1] 28 USC § 1343 provides in pertinent part:
"The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution . . . or any Act of Congress . . . of the United States.

complaint. Both questions must be answered in the affirmative and therefore the defendant's motion must be denied. To conclude that defendant is a "person" within the contemplation of the act raises no serious objection. Congressional intent necessarily extends to the actions of some entities, including hospitals, as well as those of individuals.[2]

To conclude that the defendant here acts under color of state law is not difficult. The agreement between the defendant and Deaconess Hospital, testified to by the defendant's administrator, renders it the exclusive maternity facility in the area. This unique fact is important to this decision. The agreement narrowly limits the choices available to an expectant mother; it effectively eliminates alternatives. The consequence, in judicial cognizance, and ignoring for the moment events subsequent to the initial agreement, is that there is but one hospital to which the plaintiff could be admitted for the delivery of her child. The defendant, through the volitional act of its directors, has placed itself in this position. Being the singular institution equipped to provide the maternity and post-natal services which the plaintiff seeks, it would enforce a rule prohibiting the performance of surgical sterilization procedures. The constitutional vitality of the rule and its enforcement are the "merits" of this cause; whether the promulgation of the rule and its enforcement are acts done under color of law is the sole question here to be decided.

I conclude that the exclusive public service function of this hospital is sufficiently affected by the general control of state law and regulation and connected sufficiently with federal funds administered by the state to justify a finding that the defendant is acting under color of law for purposes of application of 42 USC § 1983. This conclusion is supported by inquiry into the nature and sources of the funding of the defendant, the nature and extent of supervision

[2] Hoffman v. Halden, 268 F2d 280 (9 Cir. 1959) Citta v. Delaware Valley Hospital, 313 F.Supp 301 (ED Penn. 1970.)

and control of institutions such as the defendant expressed in Montana Law, and finally, the existence of a preferred position occupied by hosptials generally under the Montana tax structure.

Initially, I note that the defendant Corporation is the beneficiary of Federal Hill-Burton Act Funds.[3] Although the defendant, as it presently exists, was not the entity receiving the funds, it occupies and uses the facilities of its predecessor which were constructed through the use of the funds. "Hospitals which receive Hill-Burton Act funds are affected with state action, . . ." and therefore are amenable to claim of deprivation of civil rights under § 1983.[4]

Although the fact that the defendant is the beneficiary of the receipt of Hill-Burton Act funds is alone sufficient to support an assumption of jurisdiction here, it is well to note two other connections between the defendant and state law which serve to substantiate the assumption of jurisdiction in this case.

First, the defendant, as a hospital, is granted a tax dispensation under Montana Law.[5] The immunity granted extends to taxes assessible on its physical structure and property. The existence of this status benefit, though it does not confer the authority under which defendant acts,

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[3] The fact of the recipt of the funds was stipulated to by the parties in open court during the hearing on the issuance of an injunction, October 27, 1972.

[4] Chrisman v. Sisters of St. Joseph of Newark, et al., Unpublished memorandum opinion, US District Court for the District of Oregon, dated July 22, 1972. See also: Citta, supra; Simkin v. Moses H. Cone Memorial Hospital, 323 F2d 959 (4 Cir 1963); Sams v. Ohio Valley Gen. Hospital Assoc., 413 F.2d 826 (4 Cir. 1969).

[5] See: Montana Construction, Article XII, § 2; R.C.M. 1947 § 84-202.

facilitates the operation of the defendant institution, and in connection with the statutory structure next mentioned, presents a pattern of state action required by § 1983. Second, Montana Law provides for strict licensing, regulation and control of hospitals.[6] The defendant can not provide hospital services without a state license, and the license is subject to the continuing control of the state, and requires annual renewal. In fact, a hospital is prohibited from discriminating among patients and from interfering in the doctor-patient relationship.[7]

While not every licensee of a state can reasonably be held to be acting under color of law by virtue of the license, the type of license and the control exercised over the licensee, the taxation exemption, and the agreement here between the hospitals, are circumstances which distinguish the case from the ordinary licensing case, and make it one in which it can fairly be said that defendant acts under color of law.[8] The nature of defendant's business places it in a position not unlike that occupied by a common carrier or public utility. Though it may not always be legally bound to do so, a hospital has a moral obligation in fulfilling its public function to take all who seek its services.

Therefore, I hold that where a hospital in this State is or makes itself the exclusive source of services, and where it benefits from the receipt of Hill-Burton Act funds, it necessarily acts under color of law for purposes of jurisdiction under 42 USC § 1983.[9]

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[6] See: R.C.M. 1947, § 69-5201 et seq.

[7] See: R.C.M. 1947 § 69-5217.

[8] See: Coke v. City of Atlanta, 184 F.Supp. 579 (DC Ga 1960).

[9] The court wishes to make clear that it does not express an opinion as to its jurisdiction of this case had there not been the agreement between the local hospitals. The exclusiveness of

In conclusion, it must be noted that the plaintiff submitted her case to a panel of the obstetrics staff of defendant hospital. By doing so, she has exhausted the administrative remedy available to appeal the denial of the surgical procedure by the hospital.

It Is Ordered that defendant's motion to dismiss for lack of jurisdiction is denied.

Done and dated this 31st day of October, 1972.

/s/ James F. Battin
James F. Battin
United States District Judge

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the defendant's facilities weigh heavily here; had plaintiff been able to obtain reasonably alternative services, a different case for jurisdiction would be present. The court holds only that it has jurisdiction of the narrow facts presented by this case.

Amended Memorandum Opinion and Order
United States District Court

No. 1090

(Caption Omitted in Printing)

AMENDED MEMORANDUM OPINION AND ORDER

(Filed November 1, 1972)

Having heard the evidence presented by both parties and considered their memoranda, the court is convinced that the plaintiffs are entitled to injunctive relief requested.

Initially, the court notes that it has jurisdiction of this case under 42 U.S.C. § 1983 and 28 U.S.C. § 1343. The reason for this conclusion will be more fully elucidated by a subsequent memorandum. At this juncture, it is sufficient to note that the court considers the defendant to be a "person" "acting under color of law" within the meaning of the former statute because of the advantageous position accorded it by this state's tax structure and the benefit it has received by virtue of Hill-Burton funds.

Regarding the prayer for injunctive relief, it is the opinion of the court that plaintiffs have established all of the elements necessary to move it to exercise its discretion by restraining the defendant.

The principal plaintiff is scheduled to undergo a Caesarian section on October 31, 1972. Her consulting obstetrician, Dr. H. C. Kayser, has recommended that she simultaneously undergo a tubal ligation.

Her right to request and undergo this latter procedure, though not definitively presented as a question at the hearing or by brief, is necessarily an element that this court must find present to grant injunctive relief. I am

convinced that such is a right protected by the Constitution of the United States. See *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

The defendant denies plaintiff the exercise of this right by its prohibition of sterilization procedures absent serious medical indications. On balance, the detriment caused the defendant by enjoining enforcement of its prohibition is nonexistent. On the other hand, the protocol adopted by defendant to allow the plaintiff to exercise her right, under defendant's terms, would, by the admission of defendant's witness, subject the plaintiff and her child to an additional risk. The magnitude of that risk escapes measure—but the fact that it exists is in itself sufficient to support this conclusion.

Furthermore, the testimony presented today raises grave doubts as to the constitutional validity of the defendant's regulation. Thus, the evidence indicates a probability of plaintiff's success on the merits.

The fact that granting an injunction will do little, if any, harm to defendant, while not granting it will subject the plaintiff and her child to a risk not otherwise present in the delivery of a child, all because of the defendant's regulation, and the grave constitutional doubts surrounding the regulation, leads the court to conclude that the injunction should be granted. Therefore,

It Is Ordered that the defendant, its employees and agents, are hereby enjoined from denying the plaintiff, Gloria Jeane Taylor, and her physician or physicians, the use of defendant's facilities for the performance of a tubal ligation contemporaneously with the Caesarian section scheduled for said plaintiff on the 31st day of October, 1972.

It Is Further Ordered that the defendant, its employees and agents, are enjoined from denying the use of its

facilities to any physician or physicians on its medical staff for the performance of a tubal ligation contemporaneously with a Caesarian section unless the hospital can affirmatively show that for medical reasons a tubal ligation should not be performed under the circumstances.

/s/ James F. Battin
James F. Battin
United States District Judge

In the

Supreme Court of the United States

No. 75-759

JAMES MICHAEL TAYLOR and GLORIA JEANE TAYLOR, husband and wife, on behalf of themselves, individually, and on behalf of others who may be members of a class of persons similarly situated,

Petitioners,

v.

ST. VINCENT'S HOSPITAL, a Montana Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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In the

Supreme Court of the United States

No. 75-759

JAMES MICHAEL TAYLOR and GLORIA JEANE TAYLOR, husband and wife, on behalf of themselves, individually, and on behalf of others who may be members of a class of persons similarly situated,

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 523 F.2d 75 (9th Cir. 1975).

JURISDICTION

The jurisdictional requisites are sufficiently stated in the Petition.

QUESTIONS PRESENTED FOR REVIEW

Respondent accepts the statement of question numbered III set forth on page 4 of the Petition. However, questions numbered I and II on that page of the petition are more accurately stated as follows:

I. Whether Congress can constitutionally protect denominational hospitals by enacting legislation providing that such hospitals cannot be forced to allow surgical sterilizations in their facilities, contrary to religious beliefs, because of the acceptance of Hill-Burton funds?

II. Whether there is sufficient state nexus to find that a denominational hospital is acting under color of state law where regulation, licensing, tax exemption, and receipt of Hill-Burton funds are not related to the prohibition, because of religious beliefs and moral convictions, of the use of its facilities for voluntary surgical sterilizations?

STATUTES INVOLVED

This case involves two statutes in addition to § 401 (b) of the Health Programs Extension Act of 1973 (42 U.S.C. § 300a-7) quoted on pages 2-3 of the Petition. These statutes are 28 U.S.C. § 1343 and 42 U.S.C. §1983 which are printed in the Appendix.

STATEMENT OF THE CASE

Respondent St. Vincent's Hospital and Deaconess Hospital are the only hospitals in Billings, Montana. In June, 1972, the maternity departments of the two hospitals were combined at St. Vincent's Hospital and an intensive care nursery facility was constructed as a part of the consolidation in order to reduce infant mortality in the community and to reduce the cost to the community of duplicated maternity services. A prior feasibility study had estimated that it would cost approximately $900,000 to combine the facilities at Deaconess Hospital, while the cost of locating the combined facility at St. Vincent's was estimated at only $50,000. Because of the cost, Deaconess Hospital was unwilling to accept the combined facility and it was apparent that the intensive care facilities and better maternity facilities would not be provided for the community unless they were combined at St. Vincent's Hospital. Prior to approving consolidation of maternity services at St. Vincent's Hospital, the Trustees of Sisters of Charity of Leavenworth advised local obstetricians and trustees of Deaconess Hospital that surgical sterilizations would not be allowed at St. Vincent's Hospital.

The Petitioners, Mr. and Mrs. Taylor, who expected delivery of their second child at St. Vincent's Hospital by cesarean section, requested permission of

the hospital for Mrs. Taylor to be sterilized there by tubal ligation at the same time as the cesarean section. This request was denied on the basis of the "Ethical and Religious Directives for Catholic Health Facilities". Thereafter the Petitioners filed this action seeking money damages, [1] and both a preliminary and a permanent injunction compelling the hospital to permit Mrs. Taylor and others similarly situated to have tubal ligations in conjunction with child delivery by cesarean section in the hospital.

Prior to the commencement of the action, St. Vincent's Hospital and Deaconess Hospital entered into an agreement whereby after a woman had been admitted to St. Vincent's Hospital she could be transferred by ambulance approximately two and a half city blocks to Deaconess Hospital where the cesarean section and tubal ligation could be performed and the baby delivered. It provided for the maintenance and transfer of intensive care equipment (a Kreiselman and Armstrong incubator and adapter) to Deaconess Hospital the evening before the scheduled surgery, and the transportation back to St. Vincent's Hospital of the intensive care equipment, mother and newborn child, after surgery.

Initially, on October 27, 1972, the district court

1. No monetary damages appear in the Stipulation of Facts filed in the district court and no proof of damages was ever offered.

nonetheless issued a preliminary injunction allowing Mrs. Taylor to have a tubal ligation with the cesarean section at St. Vincent's Hospital and found that the hospital had acted "under color of state law" within the meaning of 28 U.S.C. § 1343 and 42 U.S.C. § 1983 by virtue of its advantageous state tax position and receipt of Hill-Burton funds. The tubal ligation was performed on Mrs. Taylor. However, on June 18, 1973, the "Church Amendment", (§ 401(b)) of the Health Programs Extension Act of 1973, P.L. 93-45, 87 Stat. 91, was signed into law. Thereafter, finding that "(b)y its plain language, the Act prohibits any court from finding that a hospital which receives Hill-Burton funds is acting under color of state law," the district court dissolved its prior injunction and denied all relief.

On appeal the Court of Appeals for the Ninth Circuit affirmed.

REASONS FOR DENYING THE WRIT

The court below ruled for Respondent on separate and independent grounds. First, the court reaffirmed the constitutionality of § 401(b) of the Health Programs Extension Act of 1973, [2] and held that it precludes the injunctive relief the petitioners seek. Second, the court found that "state action or color of state law was

2. Previously in **Chrisman v. Sisters of St. Joseph of Peace**, 506 F.2d 308 (9th Cir. 1974), the Ninth Circuit ruled § 401(b) to be constitutionally valid.

not involved" (523 F.2d at 78) in the rule of St. Vincent's Hospital against surgical sterilization. Special and important reasons of sufficient dimensions to justify a review of these rulings are totally lacking.

I.

No Conflict Exists Among the Circuits Respecting The Validity of §401(b) of the Health Programs Extension Act of 1973, and its Validity is not Legitimately in Doubt.

The ruling upholding and applying § 401(b) of the Health Programs Extension Act of 1973 does not conflict in any respect with decisions rendered by other courts of appeals. The only case involving § 401(b) decided by another court of appeals is *Doe v. Charleston Area Medical Center, Inc.*, ... *F.2d* ..... (4th Cir. 1975). The court of appeals in that case struck down a rule against abortion promulgated by the Charleston Area Medical Center. The court ruled that § 401(b) was not in issue because a state criminal abortion statute was the basis of the hospital's rule, not religious beliefs or moral convictions. There was not even a suggestion in the court's opinion, however, that it doubted the validity of § 401(b) or that it would hesitate to apply it in an appropriate case.

The principles of constitutional law which compelled the Ninth Circuit to uphold § 401(b) have been fully settled by this Court and are not controversial in

the lower federal courts. Consequently, although the Court has not specifically passed on the constitutional validity of § 401(b), it need not do so.

That legitimate interests are served by such provisions and that Congress has the power to enact them are conclusions which clearly emerge from previous decisions of the Court. Section 401(b) was enacted by Congress to protect the religious freedom of those who object to sterilization and abortion for religious and moral reasons. The need of denominational hospitals for this protection was recognized in *Doe v. Bolton*, 410 U.S. 179 (1973). In ruling the Georgia criminal abortion statute unconstitutional, the Court recognized that a hospital "has legal rights and obligations" (410 U.S. at 197), but held that a mandatory hospital abortion screening committee could not be justified as a necessary means of protecting religious and moral beliefs of physicians and denominational hospitals because these rights were protected by other Georgia laws. Commenting on these laws which permitted doctors to decline to perform abortions and hospitals to refuse to allow abortions in their facilities, the Court said:

> "And the hospital itself is otherwise fully protected. Under (Georgia law) the hospital is free not to admit a patient for an abortion. It is even free not to have an abortion committee. Further a physician or any other employee has a right to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions obviously are in the statute *in order to afford appropriate protection to the individual and to the de-*

nominational hospital." (Emphasis added.) *Doe v. Bolton,* 410 U.S. at 197-198.

This case does not present a legitimate issue of whether Congress has encroached upon the judicial function. Section 401(b) does not affect the judicial prerogative of deciding whether or not "state action" is present in a particular case. Rather, it is a jurisdictional statute which is narrowly drawn to eliminate the power to issue injunctive relief in cases where receipt of Hill-Burton funds is essential to jurisdiction. This restriction of jurisdiction is clearly within the power of Congress; the Court has consistently held that Congress can alter and modify the jurisdiction which it has conferred upon the inferior United States courts. See, e.g., *Cary v. Curtis,* 44 U.S. (3 How.) 236 (1844); *Kline v. Burke Construction Co.,* 260 U.S. 226, 234 (1922); *Lauf v. E. G. Shinner & Co.,* 303 U.S. 323, 330 (1938); *Lockerty v. Phillips,* 319 U.S. 182, 187 (1943).

And there is no significant question here of a possible Congressional violation of the Establishment Clause of the First Amendment. The hospital, too, has rights under the First Amendment. [3] In *Sherbert v. Verner,* 374 U.S. 398 (1963), the Court ruled that South Carolina could not require a Seventh-day Adventist, as a condition to receipt of unemployment benefits, to submit herself for employment which required her to

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3 Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 115 (1952).

work on Saturdays in violation of her religious beliefs. The Court said:

> "In holding as we do, plainly we are not fostering the "establishment" of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits . . . reflects nothing more than the governmental obligation of neutrality in the face of religious differences . . . ." 374 U.S. at 409.

Similarly, the enactment of § 401(b) does not "foster the 'establishment'" of those religions which regard voluntary sterilization and abortion as immoral or sinful. To the contrary, Congress has maintained its neutrality in this debate by preventing the reception of federal funds from being used as a basis for compelling a hospital to allow such surgery contrary to its religious and moral beliefs. Section 401(b) plainly does not transgress the Establishment Clause. *Walz v. The Tax Commission of the City of New York,* 397 U.S. 664 (1970).

The arguments underlying the Petitioners' attack on the constitutionality of § 401(b) do not present serious, difficult or controversial issues meritorious of this Court's attention.

II.

The Circuit Court's Ruling on the State Action Issue is Clearly Correct and Does not Present an Appropriate Question for Review.

The finding of the Ninth Circuit that color of state law is not involved in St. Vincent's rule against sterili-

zation likewise is not appropriate for review. The ruling of the court below on this issue was only an alternative ground for its decision. Since the court correctly ruled that § 401(b) is valid and eliminates the power to grant the injunction the Petitioners seek, the state action issue need not be reached.

However, Petitioners urge the Court to grant certioari to resolve the question of whether color of state law must be found in rules of private hospitals concerning sterilization and abortion procedures because of the reception of Hill-Burton Act funds. The decision in this case is in accord with a long line of cases. [4]

On December 1, 1975, the Court denied the application for a writ of certioari in *Greco v. Orange Memorial Hospital Corporation,* Cause No. 75-432, seeking review of the decision of the Court of Appeals for the Fifth Circuit, reported at 513 F.2d 873 (5th Cir. 1975). The same issue was involved in that case and the ruling was the same as here. Although both St. Vincent's and Orange Memorial hospitals have received Hill-Burton Act funding, the instant case is even less appropriate for review than was *Greco.* St. Vincent's Hospital is a privately owned and operated denominational hospital. Orange Memorial Corporation, however, was not denominational; moreover, the hospital facilities were owned by the public and leased to the corporation. *Greco* thus presented a more substantial state action issue than the present case in light of *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961).

4 Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973); Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973); Watkins v. Mercy Medical Center, 520 F.2d 894 (9th Cir. 1975); Jackson v. Norton-Children's Hospitals, 487 F.2d 502 (6th Cir. 1973); Barrett v. United Hospital, 376 F. Supp. 791 (S.D.N.Y. 1974); Allen v. Sisters of Joseph, 361 F. Supp. 1212 (N.D. Tex. 1973), aff'd 490 F.2d 81 (5th Cir. 1974). See also Nyberg v. City of Virginia, 495 F.2d 1342, n.6 (8th Cir. 1974).

The circuit court's finding that there is no color of state law or state action in the surgical sterilization rule of St. Vincent's Hospital is clearly correct. In *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974), the Court held that a finding of state action in the conduct of a state regulated entity must be based upon "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself". (419 U.S. at 351). A "nexus" is totally lacking between St. Vincent's ban on voluntary sterilization surgery in the hospital and grants by the state of Montana of Hill-Burton Act funding to the hospital.

CONCLUSION

For these reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

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28 U.S.C. § 1343

"§ 1343 Civil rights and elective franchise.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

"(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

42 U.S.C. § 1983

"§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."